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No. 79-1467

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERROLD E. STEVENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 612 F.2d 1226.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1979. A petition for rehearing was denied on February 27, 1980 (Pet. App. A10). The petition for a writ of certiorari was filed on March 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to suppress the testimony of a co-conspirator as the product of illegal electronic surveillance.

2. Whether the indictment was defective in stating the offenses charged.

3. Whether the evidence was sufficient to support petitioner's conviction under the Travel Act (18 U.S.C. 1952).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 846, and of interstate travel with intent to promote the conspiracy to distribute heroin, in violation of 18 U.S.C. 1952. He was sentenced to concurrent terms of ten years' imprisonment on the conspiracy count and five years' imprisonment on the Travel Act count, with immediate eligibility for parole pursuant to 18 U.S.C. 4205(b)(2). In addition, a three-year special parole term was imposed on the conspiracy conviction.[1] The court of appeals affirmed (Pet. App. A1-A9).

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[1] The question whether 21 U.S.C. 846 authorizes imposition of a special parole term is currently before the Court in *United States* v. *Bifulco*, No. 79-5010 (argued Feb. 27, 1980). Disposition of this case need not be deferred pending decision in *Bifulco*, however. Petitioner does not contest the validity of his special parole term, and at all events he may seek correction of his sentence pursuant to Fed. R. Crim. P. 35 if the Court in *Bifulco* holds that such parole terms cannot be imposed for Section 846 conspiracies.

1. The evidence at trial showed that petitioner and William Deal, a co-defendant who pleaded guilty and testified as a government witness, were partners in the heroin business. Deal, a heroin addict (Tr. 10),[2] initially supported his narcotics habit by shoplifting merchandise that he then sold to petitioner. Petitioner, the proprietor of a retail store, resold the stolen items brought to him by Deal and others (Tr. 14-15). Subsequently, Deal made arrangements to obtain heroin in California, which he sold to other shoplifters in the Kansas City area (Tr. 19-23). After a time, Deal retained certain of his "customers" to make the actual street sales for him (Tr. 26-27). In late November 1976, Deal purchased for $30,000 a half-interest in the legitimate operations of petitioner's store (Tr. 29-30, 31). Because it proved impossible to segregate the store's legitimate profits from those earned through the illegal "fencing" operation, the arrangement was soon changed to give Deal a half-interest in the entire operation of the store in exchange for a half-interest in the heroin business (Tr. 30-31). In this way, the two businesses were effectively combined; the profits from both were intermingled, and shoplifters who brought their stolen

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[2] "Tr." refers to the trial transcript. "H. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

merchandise to petitioner's store were often paid directly with heroin rather than in cash (Tr. 32-33).

In late December 1976, petitioner and Deal traveled by commercial airline from Kansas City to Las Vegas, Nevada. The trip was financed with the profits from the illegal fencing and heroin operation (Tr. 33-34). While this trip was intended in part to be a vacation, it was also designed to enable petitioner to meet Deal's California supplier, George Childress, and to arrange a large heroin purchase from Childress (Tr. 34-36). Childress, however, was unable to keep the appointment, and, despite several telephone conversations between Deal in Las Vegas and Childress in Los Angeles, an alternate meeting could not be scheduled (Tr. 37). Upon his return to Kansas City, Deal arranged a smaller purchase from Childress. On January 6, 1977, Deal was arrested at the Kansas City airport upon accepting delivery from Childress' courier (Tr. 39-40; H. Tr. 16-19).

Approximately five weeks after his arrest, Deal agreed to plead guilty to the conspiracy charge and to testify against his confederates, including petitioner. In return, the government dropped the substantive charges against Deal and agreed that he would not be sentenced to more than five years' imprisonment on the conspiracy count (Tr. 43; H. Tr. 15-16, 20-21).

2. The investigation that led to the indictment in this case initially focused on Deal (H. Tr. 6-7). The Drug Enforcement Administration, the Kansas Bureau of Investigation, and the local police all had

information that Deal was involved in the distribution of heroin in the Kansas City area (H. Tr. 6, 8-9, 11, 13, 24-28, 31-33). However, this information was not considered sufficient to seek a search warrant or indictment against Deal (H. Tr. 14). Accordingly, on November 30, 1976, authorization was obtained from a state court to institute a wiretap on the residence telephone of James Etter, who was known to be selling heroin supplied by Deal (H. Tr. 5, 7, 13, 27-28, 32). Based in part on information gained from the Etter wiretap, state-court authorization was obtained on December 8, 1976, to establish a wiretap on the telephone in Deal's residence (H. Tr. 5, 15). On December 20, 1976, a state court, relying in part on the results of the preceding wiretaps, authorized a wiretap to be conducted on the phone in petitioner's store (H. Tr. 6, 15).

Information acquired from these wiretaps provided the basis, directly or derivatively, for 24 of the 29 overt acts alleged in the conspiracy count of the indictment (see H. Tr. 17-18). Nine of the overt acts involved telephone conversations between Deal and Childress to arrange for shipments of heroin from Los Angeles to Kansas City. Three overt acts pertained to meetings involving Deal and Childress' couriers that had been arranged in telephone conversations between Deal and Childress. Four involved telephone conversations between Deal and Etter concerning heroin to be furnished to Etter by Deal. Only eight of the overt acts (nos. 10, 14, 17, 18, 20, 22, 23, and 25) involved telephone conversations in which

petitioner participated; for the most part, these consisted of Deal's status reports to petitioner regarding the heroin shipments from Childress. According to the wiretap logs, none of these 24 overt acts was based on or derived from the wiretap placed on petitioner's store.

Prior to trial, petitioner moved to suppress the wiretap evidence and all evidence derived therefrom on the ground that the wiretaps had been instituted in violation of state law (Pet. 6, 13). In turn, the government sought a decision in advance of trial on the admissibility of Deal's testimony (*id.* at 6). The district court orally granted petitioner's suppression motion with respect to the wiretap evidence itself (H. Tr. 3), but, after an evidentiary hearing and submission of briefs (H. Tr. 37-39), it ruled that Deal's testimony was not tainted by the unlawful wiretaps and therefore was admissible (Pet. App. A4).

ARGUMENT

1. Petitioner's principal contention (Pet. 10-17) is that Deal's testimony should have been suppressed as the product of unlawful electronic surveillance. In petitioner's view, Deal's testimony was the direct and unattenuated result of the illegal wiretaps and ensuing charges that led Deal to agree, as part of a plea arrangement, to become a prosecution witness. The courts below correctly rejected this contention.[3]

[3] Petitioner's argument repeatedly asserts that Deal's testimony should have been suppressed under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* However, as petitioner acknowledges (Pet. 13), the wiretaps were held unlawful solely because the applications submitted to the state courts in support of the requested authorizations were invalid under the Kansas statute. While this may establish a violation of Title III (see 18 U.S.C. 2516(2), 2518(10)(a)(i)), there is no basis to conclude that such defects in the authorizations amount to a violation of the Constitution. In any event, even assuming the applicability of suppression standards established pursuant to the Fourth Amendment and the federal wiretap statute, the courts below correctly upheld the admissibility of Deal's testimony.

Initially, it does not appear that petitioner has "standing" to seek suppression of Deal's testimony.[4] Neither the wiretap on petitioner's store nor the conversations in which petitioner participated contributed to the inculpatory evidence against Deal that led to the eventual plea bargain and Deal's agreement to appear as a government witness. Rather, the case against Deal was based on Deal's telephone conversations with Etter and Childress, none of which involved petitioner or were obtained through the wiretap on his store; although the conversations between petitioner and Deal served to incriminate petitioner, they were at most cumulative and peripheral with respect to Deal. Thus, since petitioner's rights were not violated by the acquisition of the evidence used by the government in plea negotiations with Deal, he is not entitled to object to the testimony offered

[4] The test for "standing" is the same under the Constitution and Title III. See *Scott* v. *United States*, 436 U.S. 128, 139 (1978); *Alderman* v. *United States*, 394 U.S. 165, 173 n.6, 175-176 n.9 (1969).

by Deal that resulted from those negotiations. See *Alderman* v. *United States*, 394 U.S. 165 (1969).[5]

At all events, Deal's testimony was properly found to be sufficiently attenuated from the unlawful wiretaps to be introduced at petitioner's trial.[6] This Court has consistently held that evidence is not rendered inadmissible simply because there is a "but for" or "cause in fact" relation between that evidence and unlawful police activity. See *United States* v. *Ceccolini*, 435 U.S. 268, 274, 276 (1978); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). Rather, the relevant inquiry is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" *United States* v. *Ceccolini*, *supra*, 435 U.S. at 273-274, quoting *Wong Sun* v. *United States*, *supra*, 371 U.S. at 487, 491. And, in applying this attenuation analysis to live-witness testimony, "a closer, more direct link between the illegality and that kind of testimony is required [to justify suppression than in the case of tangible evidence]. * * * [T]he exclusionary rule should be

[5] By the same token, petitioner would not have "standing" to seek suppression of any recorded conversations in which he was not a party or which were not obtained as a result of the wiretap on his store.

[6] As petitioner apparently recognizes (Pet. 16), the same attenuation analysis is applicable under both the Constitution and Title III. See *Scott* v. *United States*, *supra*, 436 U.S. at 139; *United States* v. *Giordano*, 416 U.S. 505, 528 & n.17 (1974).

invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *United States* v. *Ceccolini*, *supra*, 435 U.S. at 278, 280.

In this case, the nexus between the illegal electronic surveillance and Deal's testimony was sufficiently "attenuated as to dissipate the taint." Law-enforcement officials were aware of Deal's identity and his role in the heroin operation independently of the wiretaps. See *United States* v. *Ceccolini*, *supra*, 435 U.S. at 279. In addition, the purpose of the surveillance was to develop evidence against Deal rather than against petitioner (who, it appears, was not even known to the authorities prior to the wiretaps on Etter and Deal), and "[t]here is * * * not the slightest evidence to suggest that * * * [the surveillance was conducted] with the intent of finding * * * evidence * * * [against petitioner], much less any suggestion that * * * [it was conducted] with the intent of finding a willing and knowledgeable witness to testify against [petitioner]." *Id.* at 279-280. Furthermore, there is no indication that the police activity in question here, which was found unlawful under the state wiretap law, was in any sense flagrant or willful. See *Brown* v. *Illinois*, *supra*, 422 U.S. at 604.

Finally, and most importantly, Deal's decision to testify for the government resulted from the exercise of his "free will" and was "truly the product of detached reflection." *United States* v. *Ceccolini*, *supra*,

435 U.S. at 276, 277. Although he was a "putative defendant [under] arrest" (*id.* at 276), Deal initially refused to cooperate with the prosecutor. Approximately five weeks after his arrest, however, and following consultation with his attorney and negotiation of a plea arrangement, Deal made statements implicating petitioner and others. In exchange, the government dropped certain charges against Deal and agreed to a maximum sentence on the conspiracy count (Pet. App. A3-A4). It is thus clear that Deal, after full consideration and with the advice of counsel, was simply seeking to achieve the most advantageous plea-bargain possible. Cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978).[7] That Deal's decision might have been influenced in part by the wiretaps, the legality of which he elected not to challenge when he pleaded guilty, does not vitiate the conclusion that his plea was a voluntary act based on "free will" and "detached reflection" (*United States* v. *Ceccolini*, *supra*, 435 U.S. at 276, 277). See *Parker* v. *North Carolina*, 397 U.S. 790, 796-797 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970).

Accordingly, Deal's testimony was not tainted by the unlawful wiretaps and was properly admitted at petitioner's trial. See *United States* v. *Leonardi*, Nos. 79-1214, 79-1224 (2d Cir. Apr. 17, 1980), slip op. 2471-2474; *United States* v. *Houltin*, 566

[7] The court of appeals also noted (Pet. App. A6) that Deal's decision to plead guilty and to testify against petitioner "was in part motivated by a desire 'to change his life-style and stay out of trouble.'"

F.2d 1027 (5th Cir.), cert. denied, 439 U.S. 826 (1978); *United States* v. *Beasley*, 485 F.2d 60, 64 (10th Cir. 1973), cert. denied, 416 U.S. 941 (1974).[8]

[8] The decision of the court of appeals in this case does not, as petitioner asserts (Pet. 10, 13-14), create a conflict among the circuits. In *United States* v. *Rubalcava-Montoya*, 597 F.2d 140 (9th Cir. 1978), the court held that, "on the facts of this case" (*id.* at 144), live-witness testimony was correctly suppressed on the grounds that "there is no indication that the connection between the crime and the witnesses would have been discovered from a source independent of the illegal search" (*id.* at 143-144) and that "[n]othing in the record of the case before us indicates that in the time between the search and the trial the witnesses made an independent decision to come forward to testify to rehabilitate themselves or to assist the trier of fact in arriving at the truth of the case, or for any other reason" (*id.* at 143). In *United States* v. *Scios*, 590 F.2d 956 (D.C. Cir. 1978) (en banc), suppression of a witness's testimony was sustained because the existence of the witness was entirely unknown prior to the illegal search at issue (*id.* at 963), the search had been conducted directly to gain evidence against the defendant (*ibid.*), and the witness's testimony was not an act of free will but was "purely and simply a product of coercion * * * made solely to avoid being jailed for contempt" (*id.* at 961; see also *id.* at 963). Finally, in *United States* v. *Cruz*, 581 F.2d 535 (5th Cir. 1978) (en banc), the trial testimony of illegal aliens who had been discovered during an unlawful search of the defendant's automobile was suppressed in light of the fact that "[t]he witnesses were initially questioned at the very scene of arrest and detained only as a result of the illegal stop" and that "[t]hey were detained until the trial, and their testimony can hardly be said to be either voluntary or the result of detached reflection" (*id.* at 543). While some of the statements in these opinions can undoubtedly be read to support petitioner's position that Deal's testimony should have been suppressed, we do not believe that the holdings of these cases are in any way inconsistent with the decision of the court below. We also note that in each of those cases the testimony of the

2. Petitioner argues (Pet. 17-19) that neither the conspiracy count nor the Travel Act count charged an offense because each failed to allege a knowing and intentional plan to distribute heroin. He also urges that the Travel Act count did not charge an offense because it failed to allege that an overt act was committed in pursuance of the conspiracy.

The indictment in this case adequately stated the offenses charged. The conspiracy count charged petitioner with "willfully and knowingly" conspiring to distribute heroin, and the Travel Act count charged that he "knowingly and willfully" engaged in interstate travel "with the intent to promote a conspiracy to distribute heroin." A person who willfully and knowingly conspires to achieve an illegal end or who knowingly and willfully travels with the intent to promote a conspiracy must necessarily possess the intent that the illegal objective of the conspiracy be accomplished. Scienter was therefore adequately alleged in both counts. See 1 C. Wright, *Federal Practice and Procedure: Criminal* § 125, at 243-244 (1969); see also 8 *Moore's Federal Practice* ¶ 7.04, at 7-16 (2d ed. 1979).

With respect to petitioner's second contention, the conspiracy referred to in the Travel Act count was expressly specified to be a violation of 21 U.S.C. 846, which does not require commission of an overt act.

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witness was determined to be a fruit of an illegal search that directly violated the defendant's Fourth Amendment rights, whereas that was not the case here (see pages 7-8, *supra*).

United States v. *Michel*, 588 F.2d 986, 994 (5th Cir. 1979), cert. denied, No. 78-1498 (Oct. 1, 1979). In any event, it is clear from the face of the indictment that petitioner was charged in the Travel Act count with promoting the same conspiracy to distribute heroin that was described in the conspiracy count, which did in fact allege the commission of numerous overt acts. As the court of appeals correctly held (Pet. App. A7-A8), it was unnecessary to reallege the same overt acts in the Travel Act count.

3. Petitioner's final contention (Pet. 19-22) is that the trip to Las Vegas was, "at most, tenuously incidental" to the conspiracy to distribute heroin since "[t]he purpose of the trip was * * * pleasure" (Pet. 21). As shown above, however, Deal's testimony disclosed that the trip, while designed in part as a vacation, had the additional purposes of enabling petitioner to meet Childress and of making arrangements for a large heroin shipment from Childress. Moreover, telephone calls were made to Childress from Las Vegas in an attempt to arrange an alternate meeting when he failed to keep the planned appointment. Finally, within approximately one week after petitioner and Deal returned from Las Vegas, a smaller purchase of heroin was arranged with Childress. Hence, there was a sufficient nexus between the trip to Las Vegas and the heroin conspiracy to sustain the Travel Act conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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